UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

CREATIVE VISION RESOURCES, LLC

and

CASE 15-CA-20067

LOCAL 100, UNITED LABOR UNIONS

Andrew Miragliotta, Esq. and Kevin McClue, Esq., for the General Counsel.

Clyde H. Jacob III, Esq. (Coats Rose, PC), and Ronald L. Wilson, Esq., for the Respondent.

Rosa Hines, for the Charging Party.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. Respondent, a successor, violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Union which was the exclusive representative of the predecessor's bargaining unit employees. However, Respondent did not violate the Act in other ways alleged in the complaint.

Procedural History

This case began on June 17, 2011, when Local 100, United Labor Unions (the Charging Party or the Union) filed the initial unfair labor practice charge against Creative Vision Resources, LLC (the Respondent). It amended this charge on November 9, 2011.

After an investigation, the Regional Director for Region 15 of the National Labor Relations Board issued a complaint against the Respondent on March 30, 2012. In doing so, she acted for and on behalf of the Board's Acting General Counsel (the General Counsel or the government). The Respondent filed a timely answer.

On May 23 and July 17, 2012, the Regional Director amended the complaint. Respondent filed timely answers to these amendments.

On August 15, 2012, a hearing opened before me in New Orleans, Louisiana. On that day, on August 16 and 17 and September 29, 2012, the parties presented evidence. After the hearing closed, counsel filed post-hearing briefs.

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Admitted Allegations

In its answer and by stipulation during the hearing, the Respondent admitted certain of the allegations raised in the complaint. Specifically, the Respondent has admitted the allegations raised in complaint paragraphs 1(a), 1(b), 2(a)—2(i), 3(a)—3(c), and 6. admissions, I find that the government has proven the allegations raised in these paragraphs.

Thus, I find that the unfair labor practice charge and amended charge were filed and served as alleged.

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The Respondent has not admitted the allegations, raised in complaint subparagraphs 2(j) and 2(k), regarding the nature of its business operations. It also has not admitted the allegation, raised in complaint paragraph 4, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. However, it has admitted allegations sufficient to establish that it is such an employer.

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Specifically, the Respondent has admitted that, based on a projection of its operations since about June 2, 2011, when it began business, it will annually provide services valued in excess of \$50,000 to Richard's Disposal, Inc. The Respondent also has admitted that Richard's Disposal is an enterprise within the State of Louisiana which annually purchases and receives at its New Orleans, Louisiana facility, directly from outside the State of Louisiana, goods valued in excess of \$50,000. Based on these admissions, I conclude that the Respondent is subject to the Board's jurisdiction and meets the Board's standards for the assertion of jurisdiction. Further, I conclude that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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The Respondent has admitted, and I find, that the following individuals are its supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Alvin Richard III, owner and president; Karen Jackson, administrator.

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Status of the Parties

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In May 2010, Alvin Richard III (Richard III) incorporated the Respondent to be a labor contractor providing workers to Richard's Disposal, a company operated by his father, Alvin Richard Jr. (Richard Jr.). At the time of incorporation, another entity, referred to here as Berry III, was performing this function, and continued to do so until June 2, 2011.

Richard III is the owner and president of the Respondent, and also is a vice president of Richard's Disposal. However, the complaint does not allege that Richard's Disposal and the Respondent are a single entity and the record would not establish such an identity. For purposes

of this case, the two businesses are distinct and separate, notwithstanding Richard III's service in the management of both companies.

The employees furnished to Richard's Disposal by the Respondent (and previously by Berry III) are classified as "hoppers." As stated in the Respondent's post-hearing brief, "Hoppers ride on the rear of the garbage trucks and load the garbage from trash containers into the truck."

Although the Respondent provides the same service that Berry III had performed furnishing hoppers to work on another company's garbage trucks at one point Berry III had more customers. At that time, Berry III furnished hoppers not only to Richard's Disposal but also to Metro Disposal, another trash collection company in the New Orleans area.

Before proceeding further, to avoid confusion, it should be noted that the entity referred to here as Berry III did business under the following names at various times: M&B Services, Berry Services, Inc., Milton Berry, and a second corporation also called Berry Services, Inc. At hearing, the parties stipulated that these businesses were a single entity and single employer. For simplicity, the complaint calls this entity Berry III, as I do here.

Berry III was furnishing hoppers to Richard's Disposal on May 8, 2007, when the Board conducted a representation election. On May 18, 2007, based on the results of that election, the Board certified that Local 100, Service Employees International Union was the exclusive representative, within the meaning of Section 9(a) of the Act, of the following appropriate unit of employees:

Included: All full-time and part-time hoppers employed by the Employer who work as hoppers on trucks operated either by Metro Disposal, Inc. and/or Richard's Disposal, Inc. in the collection of garbage and trash in the Greater New Orleans area.

Excluded: All other employees, guards and supervisors as defined in the Act.

The certification identified the employer as "M&B Services," the name which the entity, here called "Berry III," was using at the time. Berry III's various name changes did not affect its continuing duty to recognize and bargain with the certified union.

In October 2009, Local 100 severed its affiliation with the Service Employees International Union and began operating under the name "Local 100, United Labor Unions." Upon this disaffiliation, bargaining unit employees who had been members of Local 100, Service Employees International Union automatically became members of Local 100, United Labor Unions. They did not have to pay an initiation or transfer fee or complete any applications.

The constitution of Local 100, United Labor Unions did not change significantly from that of Local 100, Service Employees International Union. Local 100 continued under essentially the same leadership before and after the disaffiliation. Of the 10 individuals who were board members of Local 100, Service Employees International Union, 9 became board members of Local 100, United Labor Unions.

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The disaffiliation did not affect the collective-bargaining agreements, which Local 100, United Labor Unions assumed and honored. It continued to represent employees in the bargaining unit described above as well as employees of other employers which had been parties to collective-bargaining agreements with Local 100, Service Employees International Union, and it has engaged in negotiations on behalf of such employees. Based on these facts, I conclude that Local 100, United Labor Unions is an organization in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Therefore, I conclude that it is a labor organization within the meaning of Section 2(5) of the Act.

Complaint subparagraph 8(f) alleges that Local 100, United Labor Unions is the successor to Local 100, Service Employees International Union, and succeeded to the bargaining rights of Local 100, Service Employees International Union with respect to the bargaining unit described above. The Respondent denies such successorship.

The Respondent's brief acknowledges the October 2009 disaffiliation but denies that there was continuity of representation. The Respondent characterizes Local 100, United Labor Unions as "not international in nature" and operating in only three States. The Respondent further states:

The SEIU has another local in the New Orleans metropolitan area, SEIU Local 21, and it was operating when the ULU [United Labor Unions] began operations. Tr. 725-26. Judicial notice can be taken under Federal Rule of Evidence 201 that the SEIU is a larger, more influential and more economically successful union than the ULU. This may be gleaned from the unions' respective websites, U. S. Department of Labor filings by the unions, and news articles and reports.

Respondent's argument is not persuasive. Even assuming, solely for the sake of argument, that Local 100, United Labor Unions is smaller and less influential than the Service Employees International Union, the relevance of such a comparison escapes me. For example, historians might well regard Andrew Johnson as a less influential president than Abraham Lincoln, and Johnson certainly was shorter. However, under the law, he was indeed Lincoln's successor. Relative political skill and physical size were not cognizable factors. Likewise, here I will stick to the criteria the Board has enunciated in its precedents.

The Respondent also points out that the hoppers represented by the SEIU did not have an opportunity to vote on whether they wished to disaffiliate from the SEIU and be represented by the ULU and argues that this absence of a vote is material and should be considered. In making this argument, the Respondent seeks to distinguish *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007), which stands in the way. Therein, the Board held that an employer is not relieved of its bargaining obligation merely because a merger or affiliation is accomplished without due process safeguards. In arguing that the same principle should not be applied to <u>disaffiliation</u>, the Respondent's brief states:

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The action of a union disaffiliating from another union is unique from a union merger or affiliation. With a merger or affiliation, unions typically decide

to come together to augment their economic strength and power. This, by its very nature benefits the union membership that is merged. In contrast, a disaffiliation typically involves a new union formed by leaving a larger or more substantial one. That is what happened in the case at hand. In disaffiliations, there is not the likelihood, as in mergers, that the represented employees will be economically better off or better represented. In the case of disaffiliations, there is a greater need for the represented employees to be protected. That is why a due process election in which the affected employees vote is necessary.

However, the Board's rationale in *Raymond F. Kravis Center for the Performing Arts* did not depend on the likelihood that employees would retain or gain bargaining power. Rather, this decision rested on the Board's understanding of *NLRB v. Financial Institution Employees of America Local 1182 (Seattle-First)*, 475 U.S. 192 (1986). In that case, the Supreme Court held that the Board cannot discontinue a certified union's recognition without determining that its affiliation with another union raised a question of representation and, if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit. The Board held that the lack of a membership vote concerning union affiliation was insufficient to raise a question concerning representation, that is, to make it "unclear whether a majority of employees continue to support the reorganized union."

Following this logic, the appropriate inquiry here is not whether the change seems to increase or decrease a union's bargaining power. Rather, in weighing the Respondent's attempt to distinguish *Raymond F. Kravis Center for the Performing Arts*, the pivotal issue is whether the lack of a membership vote for <u>dis</u>affiliation is sufficient to raise a question concerning representation. Notwithstanding the Respondent's argument, I cannot conclude that a vote to disaffiliate is all that different from a vote to affiliate or merge. Where, as here, the local union leadership remains in place and continues to deal with an employer as before, very little has changed, particularly from the employees' point of view. In the present case, at least, no change has altered the local union's identity so much that it would raise a question concerning representation.

Indeed, the disaffiliation here appears little different from that in *Miron & Sons, Inc.*, 358 NLRB No. 78 (2012). There, the Board adopted the judge's finding that there was a substantial continuity of representation and, accordingly, that the employer had a continuing duty to recognize the union as the exclusive bargaining representative. The Respondent argues that in *Miron*, "the employer never challenged the union's status under the continuity of representation requirement. It is not an issue in the case." However, even were I to regard *Miron* merely as illustrative, it supports the conclusion I draw from the reasoning in *Raymond F. Kravis Center for the Performing Arts*. There, the Board stated:

In determining whether there is a lack of continuity of representation after a merger or affiliation, the Board considers whether the merger or affiliation resulted in a change that is "sufficiently dramatic" to alter the union's identity. *May Department Stores*, 289 NLRB 661, 665 (1988), enfd. 897 F.2d 221 (7th Cir. 1990). This may occur where "the changes are so great that a new organization comes into being—one that should be required to establish its status as a bargaining representative through the same means that any labor organization is

required to use in the first instance." Western Commercial Transport, Inc., 288 NLRB 241, 217 (1988).

351 NLRB at 147. Applying this same principle to the present case, involving a disaffiliation rather than a merger or affiliation, and considering the totality of the circumstances, I conclude that there is a continuity of representation. The employer here called "Berry III" had a duty to recognize and bargain with Local 100, Service Employees International Union before the disaffiliation, and after the disaffiliation, it had a duty to recognize and bargain with Local 100, United Labor Unions, which it did.

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If the Respondent is a successor to Berry III— an issue to be discussed and decided below—and if the bargaining unit remains in existence, then the Respondent now has the same duty to recognize and bargain with Local 100, United Labor Unions. However, the Respondent argues that the bargaining unit has changed in a manner which makes the present unit inappropriate. Respondent's brief states as follows:

The SEIU and Berry III entered into a collective bargaining agreement on September 1, 2007. GCX-27. Article 1, Recognition, recognizes a unit of hoppers working on trucks operated by Richard's Disposal and Metro Disposal.

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At some time after Berry III and the SEIU entered their agreement, Berry III lost its contract to supply hoppers to Metro to another company— FastTrack. Tr. 151. The union has never filed a disclaimer of interest of representation of the hoppers at Metro Disposal. Tr. 252-53.

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In the instant case, the unit used to establish successorship was only the hoppers working on trucks operated by Richard's Disposal. Hoppers working at both Richard's and Metro were not counted to determine whether [the Respondent] hired a majority of employees in the Berry III's and SEIU unit.

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With respect to the last sentence quoted above, it may be noted that in determining successorship the Board looks to whether a majority of the putative *successor's* bargaining unit employees had worked for the predecessor. That question, whether a majority of the hoppers hired by the Respondent had worked in the Berry III bargaining unit, will be addressed below.

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Here, I focus on whether Berry III's loss of the Metro Disposal contract affected the appropriateness of the bargaining unit. It is not unusual for the size of a bargaining unit to shrink when an employer loses an existing customer, just as it is not unusual for a bargaining unit to grow when an employer gains a new customer. Typically, such fluctuations do not affect either the appropriateness of the bargaining unit or the employer's duty to recognize and bargain with its exclusive representative. (An exception involves the permanent shrinking of a bargaining unit all the way down to one person, but that exception is not applicable here.)

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Berry III's loss of the Metro Disposal contract did not reduce the bargaining unit to a single employee or otherwise render it inappropriate. It continued in existence at least until June 2, 2011, when the Respondent began its business operations.

Moreover, successorship may be found even when the bargaining unit of the putative successor differs in some respects from that of the predecessor. In *Specialty Hospital of Washington-Hadley, LLC*, 357 NLRB No. 77 (2011), the Board stated:

Bronx Health Plan, 326 NLRB 810 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999), is illustrative of the extent the unit may be altered without eliminating successorship obligations. There, the predecessor employed workers in hundreds of job classifications in the recognized unit. The successor hired a tiny fraction (.05 percent) of the predecessor's bargaining unit employees (16 out of 3500), who were scattered among those many job classifications. The union sought to bargain over the 16 employees in a clerical unit. The Board found successorship because, among other things, all of the successor's unit employees had been employees of the predecessor. In short, in Bronx Health Plan, the successor's unit no longer contained the vast preponderance of the predecessor's bargaining unit job classifications and employee complement. But, as there was continuity both in the nature of the enterprise and the work force (within the contracted unit),

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The Supreme Court has instructed that the question of substantial continuity must be considered from the employees' perspective. Viewed from that perspective, it makes no difference whether the successor acquired only a part of the unit or the union disclaimed interest in a part of the unit. In either case, there is no reason to believe that employees' views on union representation have changed. Put another way, a diminution of unit scope or unit inclusion, by itself, is insufficient to meaningfully affect the way that unit employees perceive their jobs or significantly affect employee attitudes concerning union representation.

357 NLRB No. 77, slip op. at 2—3 (footnote omitted).

successorship principles resulted in a duty to bargain.

The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate. "Compelling circumstances" are required to overcome the significance of bargaining history. *Cadillac Asphalt Paving Co.*, 349 NLRB 6 (2007). Here, the Respondent has not shown such compelling circumstances. Accordingly, I reject the Respondent's inappropriate unit argument.

Was Respondent A Successor?

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The Respondent denies the allegation that it is a successor to Berry III. However, the Acting General Counsel argues that the facts meet the standards for successorship regardless of whether they are examined using the analytical framework of *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), or that of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The facts satisfy both tests.

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As stated above, Alvin Richard Jr. owns Richard's Disposal, providing trash collection services in the New Orleans area, and his son, Richard III, is the chief operating officer of that

company. It had contracted with Berry III to provide the hoppers who ride at the back of the garbage trucks and load the trash into the trucks. However, problems arose and Richard III testified he "saw it as an opportunity to start a business for myself."

Richard III decided to form a company which would replace Berry III as the supplier of the hoppers. To that end, he incorporated the Respondent in May 2010, but this company did not begin operations right away.

With assistance from an employee of Richard's Disposal, Richard III prepared employment application forms. A Berry III employee, Eldridge Flagge, passed out the applications to others employed by Berry III in the hoppers' bargaining unit. Each application included the tax forms which an employee typically completes on being hired. The record indicates that Richard III gave Flagge the forms sometime around May 19, 2011.

Flagge distributed the applications soon after he received them. However, the record indicates that Flagge played little role in collecting the completed applications. Rather, after filling out an application, a hopper would give it directly to personnel working for Richard's Disposal.

For reasons discussed later in this decision, I credit Richard III's testimony that he, too, provided application forms to some of the hoppers employed by Berry III. The record reveals an obvious motivation for doing so: The change from Berry III to the Respondent was not something which would be phased in gradually. Rather, it would be an abrupt shift from one to the other. Therefore, Richard III needed to be sure he had enough hoppers lined up to staff all the trash trucks before the Respondent replaced Berry III. Moreover, it was not Richard III's policy to place any hopper on a truck until that person had submitted an application form, including the tax forms attached to it

Richard III did not interview any applicants for employment. I infer that he presumed that all the hoppers working for Berry III were qualified, or else they would not be doing the work already. Therefore, filling out the application and tax forms was a formality, albeit a required one. Richard III testified, in part, as follows:

- Q. [I]sn't it also true at the time you started—isn't it also true at the time you started passing out the applications or gave Mr. Flagge the applications for him to pass out, it was your plan to start providing hoppers to Richard's Disposal on May 20, 2011?
- A. Yes.

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- Q Okay. But you didn't start that day, because you didn't have enough applications returned to you. Correct?
- A. Yes.
- Q. Okay. So I'm assuming on June 1, you had enough applications.
- A. Yes.
- Q. Isn't it also true that by the hoppers turning in their applications, they were agreeing to work for Creative Vision, and you were agreeing to hire them if they wanted to work?
- A. If I needed them, yes, sir.

By June 1, 2011, the Respondent had the applications of enough hoppers to staff the trash trucks, and on that date Richard's Disposal canceled its agreement with Berry III. The next day, the Respondent began providing to Richard's Disposal the same hoppers who had been doing the same work but receiving their pay from Berry III. From the hoppers' point of view, little had changed. They still reported for work at the same place, Richard's Disposal, and still rode on Richard's Disposal's trucks.

Moreover, their direct supervisor had not changed. Karen Jackson had been employed as a supervisor by Berry III, where she assigned each hopper to work on a specific truck. She continued to do the same thing.

A little before 4 a.m. on June 2, 2011, when the hoppers arrived at the Richard's Disposal facility to work, Jackson conducted a meeting to inform them that they were working for Creative Vision. In the words of one hopper, Shawn Lewis, "Ms. Jackson called a little brief meeting before any trucks drove out of the yard, and told us, 'Today is the day you start working under Creative Vision.'" Jackson also told the hoppers that they would be paid \$11 per hour, would receive overtime, and that the Respondent would guarantee each hopper 8 hours of work per day.

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On this first day, 44 hoppers worked for the Respondent. This number was sufficient to staff the trucks operated by Richard's Disposal. Specifically, Richard III testified that Richard's Disposal typically sends out 20 to 22 trucks per day and each truck has two hoppers. Thus, from 40 to 44 hoppers would be sufficient for Richard's Disposal to operate in the usual manner. Accordingly, although the record suggests that on some later days the Respondent provided, and Richard's Disposal used, more than 44 hoppers, I conclude that the 44 hoppers employed on June 2, 2011, constituted a representative complement of employees.

Under *NLRB v. Burns Security Services*, above, at least half of the employees in the representative compliment must have worked for the putative predecessor. Here, all 44 of the hoppers who worked for the Respondent on June 2, 2011, had been bargaining unit employees at Berry III. Clearly, Respondent is a *Burns* successor. Further, I conclude that the Respondent is also a successor under *Fall River Dyeing Corp. v. NLRB*, above.

In *Fall River Dyeing Corp.*, the Supreme Court articulated a "substantial continuity" test, which the Board applied in *Van Lear Equipment*, 336 NLRB 1059 (2001). The Board noted that the Supreme Court had identified the following factors as relevant:

[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.

336 NLRB at 1063. The answer to each of these questions is "yes." The business of the Respondent is the same as that of Berry III, providing employees to work as hoppers on trucks operated by Richard's Disposal. The working conditions remained the same and the employees

worked under the supervision of the same person, Karen Johnson. The production process remained unchanged. At one point, Berry III provided hoppers for two disposal services, Metro Disposal as well as Richard's Disposal, whereas it appears that the Respondent only provides hoppers to Richard's Disposal. Nonetheless, the Respondent has "basically the same body of customers" as Berry III.

These factors are assessed from the perspective of the employees, that is, "whether 'those employees who have been retained will . . . view their job situations as essentially unaltered." Id., quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973). From the perspective of the employees who appeared for work on June 2, 2011, nothing had changed. They would not have known that they were working for a different employer if their supervisor, Karen Jackson, had not told them.

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One hopper, Booker T. Sanders, who testified as a witness for the Respondent, stated that he recalled a meeting at which Jackson "said Creative Vision was taking over, and she they're paying \$11 an hour, and they're taking out taxes and Social Security." The Respondent also called to the witness stand another hopper, Harold Jefferson, who testified that Jackson "got all the hoppers, and she explained to us that, you know, Creative Vision was open, and we no longer worked for Berry." If Jackson had not called a meeting of the hoppers on June 2, 2011, and informed them that they were now working for the Respondent, they would not have known until they received their paychecks.

In sum, the evidence clearly establishes the "substantial continuity" required by the *Fall River Dyeing Corp*. test, as well as successor under *NLRB v. Burns Security Services*, above. I so find.

Is Respondent A "Perfectly Clear" Burns Successor?

In general, a *Burns* successor has a duty to recognize and bargain with the exclusive representative of the predecessor's employees but it remains free to set the initial terms and conditions of employment. However, there is an exception. In *Burns*, the Supreme Court stated that although a successor employer "is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294.

The Board has held that this "perfectly clear" exception to the general rule that a successor employer is free to set initial terms, while restrictive, should apply "to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975); see also *Grenada Stamping & Assembly, Inc.*, 351 NLRB 1152 (2007); *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 10 (2006).

The present record would not support any finding that the Respondent had misled employees, either actively or by tacit inference, to believe they would all be retained without any changes in the wages, hours, or conditions of employment. Rather, whether the Respondent is a "perfectly clear" *Burns* successor turns on whether it "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."

For example, in *Cadillac Asphalt Paving Co.*, above, the successor employer did not conduct job interviews and no evidence indicated that it sought applicants from any source other than the predecessor's work force. At a meeting with the predecessor's employees, the successor invited them to fill out job applications and W-4 forms but did not tell them it intended to set initial terms and conditions of employment. In these circumstances, the Board found that the hiring employer was a "perfectly clear" *Burns* successor.

The facts in the present case are rather similar to those in *Cadillac Asphalt Paving Co*. but certainly not identical. As described above, Richard III distributed application forms, with attached W-4 tax forms, to hoppers while they were employed by Berry III and he also enlisted the help of Eldridge Flagge, one of the hoppers in the Berry III bargaining unit. The record does not indicate that the Respondent sought employees from any other source.

To this extent, the facts here resemble those in *Cadillac Asphalt Paving Co*. However the credited evidence establishes that Richard III communicated at least some information about the contemplated wages and working conditions to at least some of the hoppers while they were still employed by Berry III. The question thus is whether the Respondent conveyed enough information to enough hoppers.

To preserve its authority to establish initial terms and conditions of employment, a successor must "clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, above, 209 NLRB at 195. What constitutes such a clear announcement? The information must be sufficient to allow the predecessor's employees to make an informed choice about whether to go to work for the Respondent.

In *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975 (2007), a successor sent a letter to the predecessor's employees offering them temporary employment. The letter stated that they were not eligible for certain benefits, and adding, "Other terms and conditions of your employment will be set forth in Windsor's personnel policies and its employee handbook."

Although the quoted statement seems to convey the successor's intent to establish a new set of working conditions, the Board held that it was insufficient to allow the predecessor's employees an informed choice concerning whether to accept the successor's employment offer or turn it down. The Board held that a general statement that new terms will subsequently be set is not sufficient to fulfill the Respondent's *Spruce Up* obligation to announce new terms prior to or simultaneous with the takeover.

In other words, applying the Board's *Spruce Up* standard faithfully requires digging deeper than might at first appear necessary from a narrow and literal reading of the test. A

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message sufficient to convey the successor's intention to establish new terms and conditions of employment may still lack enough detail to afford the predecessor's employees an informed choice. If so, the "perfectly clear" label sticks.

Thus, the doctrine has evolved since 1972, when the Supreme Court noted that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit, and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Burns*, above, 406 U.S. at 294—295. Under the doctrine, as it has now ripened and matured, a successor employer's failure to provide sufficient information to the predecessor's employees proves that it is perfectly clear the successor intended to retain all the unit employees.

Therefore, it is important to distinguish between the ordinary meaning of the words "perfectly clear" and the import of this phrase as a term of art. When used in the everyday sense, the words "perfectly clear" take the analysis in a different direction. The record makes it perfectly clear that the Respondent intended to retain the employees in the bargaining unit, but this conclusion does not rest on the amount of communication between the Respondent and the hoppers.

If the Respondent had not intended to retain the employees in the Berry III bargaining unit, it would have been a remarkable coincidence that on the first day of the Respondent's operations all 44 hoppers had been employed by Berry III. Of course, it was not a coincidence. The record does not indicate that the Respondent sought to hire hoppers from any other source.

If the Respondent had not intended to hire the members of the bargaining unit, en masse, Richard III or someone working for him would have interviewed applicants, examined qualifications, and checked references. Instead, the Respondent chose merely to distribute applications, with W-4 forms attached, to the hoppers in the Berry III bargaining unit. Typically, a job applicant does not fill out a W-4 form until hired, so inclusion of the tax form with the application suggests that the Respondent had little doubt about whom it would hire.

Richard III already knew about the quality of the hoppers' work because they performed that work for Richard's Disposal, a company he managed. His dissatisfaction was not with the hoppers themselves, but rather with Berry III's lax management practices, which included treating the hoppers as independent contractors rather than employees, failing to deduct taxes, and neglecting to follow such usual employment practices as issuing handbooks and implementing dress standards.

Moreover, the hoppers in the Berry III bargaining unit already were familiar with how Richard's Disposal operated. If the Respondent had decided to recruit through the State unemployment office or through "help wanted" advertisements, the process of selecting and training those chosen would have been a major undertaking. So it is hardly surprising that the Respondent would decide to use the same individuals who already were hopping on the trucks every morning.

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The record leaves no doubt that the Respondent's owner, Richard III, intended to employ the hoppers working in the Berry III bargaining unit, and made no efforts to hire hoppers from

other sources. Using the words "perfectly clear" in their everyday sense, that intent is perfectly clear

Is such an intention "perfectly clear" when that phrase is a term of art? To answer that question, I return to the issue of what the Respondent communicated to the hoppers while they still worked for Berry III. On this point, witnesses delivered conflicting testimony.

Richard III testified that he gave job application forms to some of the hoppers who were working for Berry III, and that when he did so he described to them the terms and conditions of employment which would be instituted by the Respondent, stating, for example, that hoppers would earn \$11 per hour. This testimony invites scrutiny because, although both the Respondent and the General Counsel called a number of hoppers to the witness stand, none testified that Richard III gave him a job application.

However, Richard III was not the only possible conduit of information from the Respondent to the hoppers. Both Richard III and hopper Eldridge Flagge testified that Richard III gave Flagge application forms which Flagge then distributed to other hoppers. According to Richard III, he gave Flagge a stack of about 15 to 20 applications and Flagge later requested more.

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Although it is undisputed that Richard III gave Flagge application forms, their testimony conflicts regarding what Richard III told Flagge. Richard III's testimony, if credited, would establish that he informed Flagge of the initial terms and conditions of employment which he intended to implement when the Respondent began operations:

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- Q. What did you tell Mr. Flagge, if anything about what the wages, benefits, and—would be?
- A. \$11 an hour, eight hours guaranteed a day, overtime if they made it, and holidays—the four standard holidays.
- Q. Did you mention anything about taxes being withheld?
- A. Yes.

However, Flagge's testimony squarely contradicts Richard III on this point:

- Q. And during that conversation, did Alvin Richard III say anything about pay to you?
- A. No.
- Q. Did he tell you anything about holiday pay during that conversation?
- A. No.
- Q. Did he say anything about new work rules?
- A. No.
- Q. During that conversation, did he say anything about an employee handbook?
- A. No.
- Q. Did he say anything about a safety manual?
 - A. No.

Before addressing this conflict in the testimony, I note that even if Richard III told Flagge about the contemplated terms and conditions of employment Flagge did not convey such information to other hoppers employed by Berry III. I credit Flagge's uncontradicted testimony that he told the other hoppers "they might have a job when they fill the application out, but they needed to have Social Security, ID to bring up in there, and I told them to bring it to Clayton, where he could make a copy of it."

Richard III's testimony, if credited, establishes that the hoppers had another source of information apart from Flagge, namely, Richard III himself. He testified that, in addition to providing Flagge application forms to distribute, he also gave out such forms to other employees in the Berry III bargaining unit:

- Q. Now, did you distribute applications during this time?
- A. Yes.
- Q. And how many applications would you say you might have distributed during this time period?
- A. Maybe 20.
- Q. What did you say to the hoppers as you gave them applications?
- A. They had to know about their wages, \$11 an hour, 40-hour guaranteed—excuse me. Guaranteed eight, 40 hours, the overtime after the 40 hours, and I was going to have to do the taxes.
- Q. Did you say holidays, too? I'm sorry. I didn't.
- A. Yes. There's four guaranteed holidays in our business.

Richard III testified that he began distributing these applications sometime in May 2011. However, he could not name any individual, except Flagge and a hopper named Terry Hills, to whom he had given an application. Richard III also testified that he received completed applications from hoppers working for Berry III but, again, could not name any person who gave him one.

Richard III's inability to identify the hoppers to whom he had given and from whom he had received application forms does raise questions about the reliability of his testimony. However, in evaluating this testimony, I cannot simply assume that Richard III was so familiar with the hoppers that he knew all of them by sight and could associate faces with names. He was not their immediate supervisor and the hoppers spent almost all their work time away from the facility.

Eight hoppers testified at the hearing, six of them called by the Respondent. However, none of these witnesses testified that Richard III had informed him of the initial terms and conditions of employment before June 2, 2011. Indeed, none of the hoppers testified that he had received such information from any source before June 2, 2011.

This absence of corroboration, as well as Richard III's inability to name specific individuals to whom he had given applications, raises some doubt about the reliability of his testimony. However, other considerations weigh in favor of crediting it.

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From Richard III's testimony and that of other witnesses, I infer that he was not very happy with the way Berry III operated. Berry III treated the hoppers as independent contractors even though they clearly had the attributes of employees—for example, they were required to work at specific times and in a specific way—and did not withhold taxes from their pay. Berry III also did not provide employees with either an employee handbook or a safety manual, and it ignored an unfair labor practice complaint, resulting in a default judgment. See *M&B Services*, *Inc.*, 355 NLRB No. 136 (2010) (not reported in Board volumes).

Richard III testified that there had been problems with Berry III, a factor in his decision to start his own company. Although his demeanor as a witness was low key, I infer that he was displeased with the laxity of Berry III and determined to run his company differently, in compliance with the law and with greater attention to workplace safety.

Thus, he instituted work rules requiring hoppers to put on vests, which I assume were similar to safety vests worn by highway construction workers, before they could get on the trucks. Richard III also established a dress code. It required hoppers to wear shirts and belts at all times and to wear their pants pulled up rather than hanging low on the waist.

This impression of Richard III being meticulous, a stickler for detail, is consistent with a portion of his testimony which otherwise puzzled me. According to Alvin Richard Jr., who owns Richard's Disposal, his son, Richard III, is vice president and manager of that company. The son, however, was not so confident he held the second title. On cross-examination, he testified, in part, as follows:

- Q. Okay. Were you the vice president of Richard's Disposal on June 1, 2011?
- A. I'm a COO. If that's a vice president, I don't know.

The General Counsel then showed Richard III a letter bearing his signature and the title "vice president." This exchange followed:

- Q. And at the bottom it says, vice president. So does that refresh your recollection as to whether or not you're the vice president or not?
- A. No.
- Q. It doesn't?
- A. I said I signed it. What my title was at the time I don't remember.

Richard III's demeanor was not belligerent or hostile and I believe he was trying to give answers which were both accurate and precise. His reluctance to agree that he was vice president, even after seeing a letter referring to him by that title, did not advance his interest in any obvious way. If he had been trying to conceal his management position with Richard's Disposal, he would not have referred to himself as "COO," chief operating officer. In view of his willingness to acknowledge that title, his hesitation about the title of vice president is difficult to understand except as a reflection of scrupulousness in attention to detail.

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The easier course, when confronted with a letter he signed which referred to him as "vice president," would have been simply to admit that "vice president" was his title. Instead, he

testified that he did not remember what his title had been at the time of the letter, an answer he could not have expected to help his credibility. Thus, Richard III impressed me as being a meticulous witness even when his answers foreseeably might be contrary to his interest.

Moreover, even though no hopper testified that Richard III told him about the initial terms and conditions, the record does establish that some hoppers had heard that the Respondent would be paying \$11 per hour. For example, a union official, Rosa Hines, reported that at least one hopper employed by Berry III had called the Union to ask about the \$11 per hour figure. Hines testified:

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What I received is a call, saying they heard a couple hoppers—I'm not sure of their names—and they heard that their wages was dropped to \$11, and I questioned on that did the management or did this new company tell you that, and they said they just hear it. They had not heard from any authorized personnel.

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The Respondent argues that the existence of this rumor—that hoppers hired by the Respondent would make \$11 per hour—supports an inference that the Respondent did, in fact, announce this pay rate to the hoppers while they were still working for Berry III. Thus, the Respondent's brief asks: "How else could hoppers communicate to Hines the pay rate of \$11/hour at [Creative Vision Resources] unless they learned it from Richard, from Flagge, or from other hoppers who learned it from Richard and/or Flagge?"

The testimony of Anthony Taylor confirms that a number of hoppers learned about the \$11 per hour wage rate while they were still working at Berry III. This same testimony illustrates the difficulty of tracking down the elusive source of this information:

- Q. Now, you mentioned \$11 an hour. What, if any, conversations were the hoppers having before this meeting about the \$11 an hour?
- A. We all congregate in the morning out there. They been knowing about the \$11 an hour.
- Q. So the hoppers before this meeting in May knew about the \$11 an hour?
- A. Sure, man. The application was passed out before. I think Flagge was passing out those applications.
- Q. Did Flagge know about the \$11?
- A. I told you, we all congregate out there in the morning. We been knowing that.

The testimony of Kumasi Nicholas, who worked in the Berry III bargaining unit, provides further evidence that hoppers knew about the Respondent's initial terms and conditions of employment before the Respondent began operations:

- Q. Before you began work for Creative Vision, did you know you were going to make \$11 an hour?
- A. Yes, sir.
- Q. Did you know you were going to be guaranteed eight hours a day?
- A. Yes, sir.
- Q. Did you know you were going to get overtime?

- A. Yes, sir.
- Q. Did you know you were going to get four holidays?
- A. Yes, sir.

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However, Nicholas' testimony does not indicate that he received this information from Richard III. Rather, he learned about the Respondent's contemplated terms and conditions of employment from Karen Jackson, who then was working for Berry III: "Well, they told us ahead of time—Ms. Jackson told us ahead of time, you know, might be switching over to another little company where—you know, a pay rate, and she just let us know ahead of time, and then that's when, you know, they started off."

Jackson did not testify that she informed the hoppers in advance, while they still worked for Berry III, about Respondent's replacing Berry III as the contractor providing hoppers to Richard's Disposal. Indeed, she stated in a pretrial affidavit, "I don't know who told the hoppers about [Respondent] CVR taking over. I was employed by Mr. Berry until June 3. The hoppers' first day was June 2. I don't know who did my job on June 2."

Jackson admitted in a subsequent affidavit, and acknowledged on the witness stand, that she erred in stating that her first day working for the Respondent was June 3 rather than June 2. For reasons discussed below, I have significant reservations about the reliability of her testimony. Therefore, crediting Nicholas, I find that Jackson, who was the hoppers' supervisor at Berry III, did inform them about some of the Respondent's contemplated initial terms and conditions of employment, including that \$11 per hour wage rate.

This finding, that hoppers working for Berry III learned some information about the Respondent from Jackson, does not contradict Richard III's testimony that he informed hoppers about the Respondent's initial terms of employment. Although Richard III's testimony is uncorroborated, it is also uncontradicted. Moreover, it is consistent with the fact that at least some hoppers knew about the contemplated \$11 per hour wage rate.

Further, as discussed above, Richard III appeared to be a sincere and meticulous witness. For these reasons, I credit his testimony that he told some of the hoppers—those to whom he gave employment application forms—that the Respondent would be paying an \$11 per hour wage, would guarantee 8 hours of employment per day, would pay overtime for hours worked in excess of 40 per week, and would withhold taxes from their paychecks. Based on Richard III's credited testimony, I also find that he told these hoppers that the Respondent guaranteed four holidays.

The record does not establish exactly how many hoppers heard Richard III make these statements about the initial terms and conditions of the Respondent. At most, Richard III likely distributed applications to less than half the hoppers in the Berry III bargaining unit.

There is no evidence that the hoppers who got their application forms from Flagge rather than Richard III received the same information. I credit Flagge's uncontradicted testimony that he did not tell them. This testimony is consistent with that of hopper Booker Sanders, who received a job application form from Flagge but no information about the Respondent's initial terms and conditions of employment. Sanders did not learn that the Respondent would be paying

\$11 per hour until he attended a meeting called by Supervisor Karen Jackson on the day the Respondent began operations.

The record affords no way of quantifying how many of the hoppers had learned about the \$11 per hour wage rate or the other terms of employment by the time they reported for work, as usual, at the Richard's Disposal facility on June 2, 2011. There, again as usual, they encountered Karen Jackson, who had been Berry III's supervisor responsible for deciding which hoppers would work on which trucks. Jackson's job with Berry III had required her to be at the facility every workday around 3:30 a.m., to take the roll and make sure each truck was adequately staffed. She had held that position through June 1, 2011, when she resigned from Berry III and accepted an offer to do the same job for the Respondent. Early on June 2, sometime between 3:30 and 4:00 a.m., Jackson called a meeting of the hoppers, announced that they no longer were working for Berry III, and told them the new terms and conditions of employment.

Before describing that meeting, I will address how much weight should be given to Jackson's testimony. Two problems raise concerns about her credibility.

The first problem concerns conflicting statements Jackson made in pretrial affidavits about the date she began working for the Respondent. In the earlier pretrial affidavit, Jackson gave June 3, 2011, as the date she started working. If so, that would indicate that she was not present on the Respondent's first day of operations, June 2, and could not then have conducted a meeting with hoppers.

However, Jackson provided a second pretrial affidavit which corrected the date. In that second affidavit, Jackson stated that she had mistakenly believed that June 3, 2011, had been a Thursday. After someone showed her a calendar, she realized that her first day of work for the Respondent actually had been June 2, 2011.

Further, there is also a separate and more serious problem. Late in the hearing, Jackson resumed the witness stand and then admitted altering the dates on the copies of some employment applications which the Respondent furnished to the Board during the investigation of the charge. These applications had been dated June 8, 2011, presumably by the applicants submitting them, but Jackson had covered up that date with a correction fluid and typed June 2, 2011, in its place.

One of the altered documents was the employment application of a hopper, Damian Pichon, which originally bore the date June 8, 2011. Jackson admitted using a correction fluid such as Wite Out to cover up this date and substituting June 2, 2011. During cross-examination by the General Counsel, Jackson testified, in part, as follows:

- Q. Ms. Jackson, why did you do that?
- A Well, as I was copying information, I just happened to look at it and see that one page had one date, and I just changed it on the front. I just changed it to try to make everything coincide, since he worked the first day. It was stupid. I didn't think it through when I did it. I just did it.
- Q. Did anyone tell you to make those changes?
- A. No.

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Both Jackson's conduct and her explanation, which I do not find wholly persuasive, raise doubts about the reliability of her testimony. Nonetheless, based on the entire record, I believe it is highly likely that Jackson did begin work for the Respondent on June 2, 2011, and did conduct a meeting with the hoppers on that date, rather than at some later time.

Moreover, this misconduct does not compel a conclusion that every bit of Jackson's testimony should be rejected. Whatever might have been the motive for her changing the dates on the application forms, I do not believe it caused her to give an incorrect starting date in her affidavit. Rather, considering all the circumstances, it seems likely that Jackson made an innocent mistake when she stated, in her earlier affidavit, that she began work for the Respondent on June 3, 2011.

Moreover, a number of hoppers testified that Jackson was present at the Richard's Disposal facility on June 2, 2011. For example, hoppers Kumasi Nicholas, Anthony Taylor, and Jason Bertrand testified that they saw Jackson at the facility on the first day of the Respondent's operations. Hopper Eldridge Flagge also was present at the facility on June 2, 2011, and saw Jackson there.

Hopper Harold Jefferson testified as follows concerning the meeting Jackson conducted on June 2, 2011:

- Q. When you began work on the very first day of Creative Vision, can you tell us what happened on that very first day?
- A. Well, we went—she held a meeting one morning

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- Q. Who is that, when you say, "she"?
- A. Ms. Jackson.
- Q. Ms. Jackson held a meeting?
- A. Yes. She got all the hoppers, and she explained to us that, you know, Creative Vision was open, and we no longer worked for Berry, and we'll receive two checks, one from Berry and one from Creative Vision, and, you know, basically that was it.
- Q. Did she tell you what you were going to get paid?
- A. Yes. She said— she explained to us how we was going to get paid, and, you know, what day the time goes in and, you know, stuff like that.
- Q. How much did she tell you you were going to get paid?
- A. She said we was going to be started off with \$11 an hour, and we was going to— you know, everything over 48 hours is 16.50 an hour, you know, and --
- Q. So you get overtime is what she was telling you.
- A. Right. And they was—they started taking taxes out, you know. They was going to start taking taxes out.
- O. Did she mention holidays to you?
- A. No. She didn't mention nothing about holidays.
 - Q. Was safety discussed?
 - A. Yes. They discussed safety.

- Q. Who gave you your application, if you recall, to work for Creative Vision?
- A. Ms. Jackson.

In sum, a number of witnesses confirm that Jackson was present at the Richard's Disposal facility and met with the hoppers on the day the Respondent began operations. Of course, some of the witnesses remembered the meeting in greater detail than others. However, all of the testimony paints a consistent picture and generally corroborates the following testimony, given by Jackson, describing what she told the hoppers at this meeting:

It was approximately about 3:40, because everybody doesn't get there for 3:30, so I waited to let some of them get there, you know, so I could meet with them. Well, they had a good bit of them that were there. So I met with them. I explained to them that it was a new company taking over that was not Berry Services anymore. It was going to be called Creative Vision. They were going to be making \$11 an hour, guaranteed eight hours, time and a half being paid to them for overtime. That's hours worked over 40 hours. I also told them that taxes would be taken out of their money. They would not receive 1099s like they did with Mr. Berry, that they would receive W-2 forms. I also discussed safety issues with them.

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- Q. What kind of safety issues?
- A. They had to have on a vest to get on a truck. They had to wear their pants pulled up. They couldn't wear their pants, because that's the fashion now where they're wearing their pants hanging down. But we don't want that. We want them to be dressed properly. They needed to have on a shirt and a belt at all times.
- Q. What, if anything, was mentioned about holidays?
- A. Yes. I told them they had four holidays. They had to work 180 days to receive the pay for the holidays.
- Q. About how long would you say that meeting lasted?
- A. Maybe 20, 25 minutes at the most.
- Q. Did it go past 4:00 p.m.—or 4:00 a.m.? Excuse me.
- A. Yes.

In at least one respect, Jackson's testimony goes beyond that of the hoppers who described the June 2, 2011 meeting. Jackson testified that some of the hoppers were so unhappy about the announced terms and conditions of employment that they walked away:

- Q. Now, when the meeting was over, were there some hoppers who weren't satisfied with the terms and conditions that—the wages, the terms and conditions that had been announced by you?
- A. Yes.
- Q. What did they do?
- A. They left the yard. They started discussing it and then they left the yard. I'm not working with this bullshit; people try to— I'm sorry, but that was— that is what was said. Okay. This is what I heard them saying. I can't pinpoint who it was, because there was a lot of people out there, and

it is dark out there in the mornings. So they left the yard. Some of them just didn't—some people did refuse to work.

Based on the evidence discussed above, I find that the Respondent's owner, Richard III, determined the initial terms and conditions of employment before the Respondent began operations. Indeed, I infer that one reason Richard III established the Respondent was to correct problems in the terms and conditions of employment under which the Berry III hoppers worked.

Although Berry III employed the hoppers, it assigned them to work on Richard's Disposal's trucks. As chief operating officer of Richard's Disposal, Richard III thus was aware of the irregularities in the way the hoppers were treated but had no direct way to address the matter so long as the hoppers worked for someone else. However, the problems were serious and some, such as Berry III's treating the hoppers as independent contractors and failing to pay overtime, appear to have violated Federal law.

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By creating the Respondent and hiring the hoppers, Richard III was able to put an end to the unlawful way they had been treated, but achieving this goal necessarily involved setting new terms and conditions of employment. Credited evidence reflects that the Respondent decided to pay the hoppers an hourly rate, with overtime, and communicated this intention well before it began operations. Similarly, the record establishes that the Respondent decided to withhold taxes from the hoppers' paychecks, and communicated this intention while the hoppers were still employed by Berry III.

In sum, the record establishes that it was "perfectly clear" (using these words in the everyday sense) that the Respondent was going to hire the predecessors employees and continue operations largely unchanged. However, the Respondent did not fail to communicate candidly with the hoppers who would become its employees and thus did not fall within the definition of "perfectly clear" successor which the Board set forth in *Spruce Up Corp.*, above.

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The reason for this apparent difference is that the Board, exercising caution, did not "push the envelope" but instead articulated a narrower standard than the Supreme Court's language arguably might support. "We concede that the precise meaning and application of the Court's caveat is not easy to discern," the Board wrote, "But any interpretation contrary to that which we are adopting here would he subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in *Burns*." *Spruce Up Corp.*, 209 NLRB at 195.

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On occasion, some Board members have expressed the viewpoint that the *Spruce Up* standard not only is more restrictive than required by the Supreme Court's language but is also, in their opinion, too restrictive. See, e.g., *Canteen Co.*, 317 NLRB 1052, 1054—1055 (1995) (Chairman Gould, concurring). However, the *Spruce Up* standard remains Board law and I apply it here.

In *Spruce Up*, after explaining its reasoning, the Board stated:

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We believe the caveat in *Burns*, therefore, *should be restricted* to circumstances in which the new employer has either actively or, by tacit inference, misled

employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. [Id. At 195 (footnote omitted, emphasis added.)]

Here, the credited evidence does not suggest that the Respondent, either actively or tacitly, tried to mislead employees into believing they would all be retained without change in their wages, hours, or conditions of employment. To the contrary, the record establishes that before it began operations, hoppers in the Berry III bargaining unit were aware that Respondent intended to make a number of significant changes.

Moreover, before 4 a.m. on the very first day of the Respondent's operations, and before hoppers got on the trucks, the Respondent's supervisor, Jackson, described the changes to them in detail. As a result, some of the workers decided not to accept employment and left.

In these circumstances, I conclude that the Respondent's conduct does not meet the test for "perfectly clear" successor which the Board established in *Spruce Up*. Therefore, I further conclude that the Respondent did not violate the Act by setting its initial terms and conditions of employment.

Refusal to Bargain Allegations

Complaint paragraph 9(a) alleges that from about October 2009 until about June 2, 2011, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the unit employed by M&B Services, Inc. The Respondent has denied this allegation.

As discussed above, the record establishes that on May 18, 2007, the Board certified Local 100, Service Employees International Union, as the exclusive representative of a unit of hoppers employed by M&B Services. The entity referred to herein as "Berry III" was doing business as M&B Services at the time of this certification and I conclude that until June 2, 2011, it had a duty to recognize and bargain with Local 100, Service Employees International and, after Local 100 disaffiliated from the Service Employees International Union, with Local 100.

Also, for the reasons discussed above, I have concluded that Local 100, the full name of which is Local 100, United Labor Unions, is the successor to Local 100, Service Employees International Union. Accordingly, I conclude that the government has proven the allegations raised by complaint paragraph 9(b).

Complaint paragraph 9(b) alleges that at all times since about June 2, 2011, based on Section 9(a) of the Act, the Union (Local 100, United Labor Unions), has been the exclusive collective-bargaining representative of the Respondent's employees in the unit. The Respondent has denied this allegation.

For the reasons discussed above, I have concluded that the Respondent became a *Burns* successor to Berry III on June 2, 2011, the date on which it began operations and on which it

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hired a representative complement of employees. The Union became the Section 9(a) exclusive representative on that date.

Complaint paragraph 10(a) alleges that about June 6, 2011, the Union, by letter, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the bargaining unit. Although the Respondent's answer denied this allegation, the evidence is clear and uncontroverted that the Union did send to the Respondent a June 6, 2011 letter requesting bargaining. Indeed, the Respondent's posthearing brief stated that "the union's state director, Rosa Hines, visited [the Respondent] on Monday, June 6, and delivered a letter demanding recognition and bargaining." Therefore, I conclude that the government has proven the allegations raised in complaint paragraph 10(a).

Complaint paragraph 10(b) alleges that since about June 6, 2011, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit. The Respondent's answer denied this allegation.

The record establishes that the Union did not receive a reply to the June 6, 2011 request to bargain. On June 17, the Union filed the unfair labor practice charge which began these proceedings.

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The Respondent did not meet with the Union until February 14, 2012, when the Union's state director, Rosa Hines, and another union representative conferred with the Respondent's attorney, Clyde H. Jacob III. After their initial meeting on Valentine's Day, representatives of the Union and the Respondent met about four more times. Hines credibly testified that the last such meeting was in late May or early June 2012:

Q. Have you scheduled any other meetings?

A. No. We're still—we're waiting back—Mr. Jacob said that he would talk his client and get back, so we're still waiting for him to get back to us.

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Hines also testified, credibly and without contradiction, that the Union and the Respondent had not reached any agreements.

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Based on Hines' testimony, which I credit, I find that between June 6, 2011, and about February 14, 2012, the Respondent failed and refused to bargain with the Union. It appears that as of February 14, 2012, when the Respondent's attorney met with the union representatives, that the Respondent has given the Union at least de facto recognition. It may be noted, however, that the Respondent's answer to the complaint, dated April 12, 2012, denied the allegation in complaint paragraph 9(b) that at all times since June 2, 2011, based on Section 9(a) of the Act, the Union has been the exclusive representative of the hoppers.

The complaint does not allege "surface bargaining," that is, going through the motions of negotiating but with an intent not to reach agreement, and the General Counsel has not argued such a theory. Additionally, the government did not seek to elicit the sort of detailed testimony about the negotiating process which is needed to prove "surface bargaining" allegations.

It appears clear that the alleged violations of Section 8(a)(5) do not concern what

happened at the bargaining table but rather the Respondent's tardiness in even coming to the table. A successor employer's obligation to recognize the union attaches after the occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the successor employer of a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor. *University Medical Center*, 335 NLRB 1318 (2001). Accordingly, the Respondent's obligation to recognize and bargain with the Union began on June 6, 2011, when it received the Union's letter demanding such recognition and bargaining.

Section 8(d) of the Act states that to "bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising there under, and the execution of a written contract incorporating any agreement reached if requested by either party." 29 U.S.C. § 158(d) (emphasis added). An unwillingness to meet at reasonable times breaches the duty to bargain in good faith.

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In Gitano Group, Inc., 308 NLRB 1172 fn. 2 (1992), a union requested bargaining in August but the employer did not schedule a meeting until late December. The employer did not offer evidence of any particularly unusual or emergency condition which would justify the delay. The Board found that the employer had violated the Act. Here, the Respondent delayed for twice as long as the employer in Gitano Group, Inc. and the record neither suggests nor supports a finding of any particularly unusual or emergency circumstance which might justify such a delay.

The Respondent certainly had sufficient opportunity to present evidence to explain the cause of the delay and to argue, if appropriate, that there were mitigating circumstances. Not only did the complaint allege a violative refusal to recognize and bargain, but the General Counsel clearly put the Respondent on notice that its delay in recognizing and bargaining with the Union was an issue in this case. Indeed, counsel for the General Counsel began his opening argument with the observation that "ignoring a responsibility won't make it go away, and the longer one ignores it, the worse the situation becomes." The General Counsel then stated:

On June 6, 2011, the hoppers union, Local 100, requested to bargain with the Respondent. Since that time, Respondent has failed and refused to recognize and bargain in good faith with the union, a plain violation of Section 8(a)(5) of the Act. Respondent knows it has this duty; yet it continues to ignore it.

Nonetheless, neither the Respondent's opening argument nor its posthearing brief focused on the approximately 8-month delay between the June 6, 2011 demand for recognition and bargaining and the first meeting, on February 14, 2012. If the Respondent believed there were legitimate reasons to justify the delay, it has not broadcast them from the rooftops.

The record leaves little room to doubt that the Respondent is, indeed, a successor to Berry III and, therefore, has become heir to Berry III's duty to recognize the Union and bargain with it. Considering that all the employees initially hired by the Respondent had worked in the Berry III bargaining unit, that they continued their same work from the same location and under the same supervision, and that there was no gap between the end of their employment with Berry and their

hire by the Respondent, the conclusion becomes inescapable that the Respondent has a successorship obligation under both the *Burns* and *Fall River Dyeing* analytical frameworks. Reaching that conclusion does not take 8 months.

Therefore, I conclude that the Respondent delayed unreasonably in replying to the Union's bargaining request and in meeting with the Union's representatives. It thereby breached its duty to bargain in good faith, as described in Section 8(d) of the Act, and violated Section 8(a)(5).

Even though the Respondent met with union representatives on February 14, 2012, it still has not clearly and unequivocally recognized the Union's status as the hoppers' exclusive representative. Indeed, its answer to the complaint denied such status. Moreover, it has taken the position, elaborated in its post-hearing brief, that the Union is not the successor to the originally certified labor organization, Local 100, Service Employees International Union. Similarly, it continues to challenge the appropriateness of the bargaining unit.

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Therefore, I conclude that, notwithstanding the five meetings at which the Respondent discussed with the Union the hoppers' terms and conditions of employment, it still has not recognized the Union as their Section 9(a) representative and, therefore, continues to violate Section 8(a)(5) and (1) of the Act.

Alleged Unilateral Changes

Complaint paragraph 11(a) alleges that about June 2, 2011, the Respondent changed the manner in which it pays its employees. As amended at hearing, complaint paragraph 11(b) alleges that about July 13, 2011, the Respondent changed the manner in which employees are selected for work. Complaint paragraph 11(c) alleges that about June 11, 2011, the Respondent promulgated new work rules in the form of an employee handbook.

The Respondent's answer denies all these allegations. Additionally, the answer raises, as an affirmative defense, that "Any unilateral change was either required by law or legally de minimis in nature."

In making these allegations, the General Counsel assumes that the evidence proves the Respondent to be a "perfectly clear" *Burns* successor, and therefore without the right to establish unilaterally its initial terms and conditions of employment. As discussed above, a "perfectly clear" *Burns* successor is an exception to the general rule that a successor employer may set its initial terms and conditions of employment without bargaining with the union.

However, for the reasons discussed above, I have concluded that the Respondent was not a "perfectly clear" *Burns* successor. Accordingly, it had no duty to bargain with the Union before establishing the initial wages and working conditions and did not violate the Act by doing so unilaterally.

Because I conclude that the Respondent did not violate the Act by establishing initial wages and working conditions, it is not necessary to reach the Respondent's "affirmative defense." However, I understand that the Respondent is raising it to argue that it could not

continue the predecessors' practice of treating the employees as if they were independent contractors, that is, by paying them by the day without regard to the Fair Labor Standards Act and by failing to withhold taxes as required by the Internal Revenue Code. These arguments, I believe, clearly are nonfrivolous and would merit consideration had I concluded that the Respondent was a "perfectly clear" *Burns* successor. However, in view of my conclusion to the contrary, I need not and do not consider the Respondent's affirmative defense.

The unilateral change alleged in complaint paragraph 11(a) concerned the Respondent paying employees at \$11 per hour, with taxes withheld. Because the Respondent was a successor, and not a "perfectly clear" *Burns* successor, it lawfully established such initial terms of employment.

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The unilateral change alleged in complaint paragraph 11(c) concerns work rules promulgated in an employee handbook. Although the complaint alleges that the Respondent issued this handbook about June 11, 2011, the credited evidence establishes that many employees received their handbooks on June 4, 2011. However, I do not believe that the lawfulness of these new rules depends either on the exact date when the handbook was printed or the date when an employee received the handbook.

The rules took effect when the Respondent began its operations, not when the handbook was printed or distributed. The issue of whether an employee had notice of a rule—and, if so, when—is distinct from the issue of when the rule came into existence. Because I find that the Respondent promulgated these rules as part of the initial terms and conditions of employment it established at startup, I conclude that it had no duty to bargain with the Union and that it did not violate the Act.

The allegations in complaint paragraph 11(b) raise different issues. Originally, paragraph 11(b) of the complaint alleged that *about June 9, 2011*, the Respondent changed the manner in which employees were selected for work. At hearing, the General Counsel moved to amend the complaint to change the date to July 13, 2011. Over the Respondent's objection, I granted the amendment. In opening argument, the General Counsel described the allegation as follows:

Lastly, under Berry, hoppers were regularly assigned to the same truck and had never been replaced by new employees for training. You will hear Respondent during July 2011, well after it had succeeded Berry, removed hoppers from their regular trucks and then replaced them with new employees, employees still in training. Respondent ignored its legal obligation to bargain with the union, and in doing so, further worsened the situation.

The General Counsel's post-hearing brief shed further light on the scope and gravamen of the allegations. It stated, in part:

[I]n July 2011, Respondent, through Supervisor Karen Jackson, began replacing experienced hoppers on trucks with inexperienced hoppers. While working for Berry III, Jackson always assigned experienced hoppers to trucks before inexperienced hoppers for safety reasons. However, Jackson changed this policy in July 2011, when she replaced hopper Eldridge Flagge with a rotation of three

new and completely inexperienced hoppers. Jackson did the same with experienced hopper Booker Sanders. Flagge and Sanders continued to show up for work, but Jackson eventually simply stopped assigning them to work for Respondent, favoring the inexperienced hoppers over the veteran hoppers.

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(Exhibit and transcript citations omitted.)

The General Counsel's argument, as set forth above, depends on the assumption that the Respondent is a "perfectly clear" *Burns* successor and therefore obligated to bargain with the Union before changing the terms and conditions of employment which the predecessor had established. However, I have concluded that the Respondent was not such a "perfectly clear" successor and thus had the right to establish its own initial terms and conditions of employment without having first to bargain with the Union.

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If the Respondent is not a "perfectly clear" *Burns* successor, then it doesn't matter whether Jackson's action changed one of the predecessor's terms or conditions of employment. Rather, the relevant question concerns whether her action changed a policy that the *Respondent* adopted when it lawfully set the initial terms and conditions of employment. A departure from the Respondent's initial terms and conditions of employment might trigger a bargaining obligation, but that would be the case only if the change affected some term or condition which was a mandatory subject of collective bargaining, and only if the change were material, substantial, and significant. See, e.g., *Ead Motors Eastern Air Devices*, 346 NLRB 1060 (2006).

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The General Counsel's post-hearing brief argues that Jackson made a change in the "method used to assign hoppers" and that this change was unlawful even if the Respondent were not shown to be a "perfectly clear" *Burns* successor. This argument appears to be premised on the assumption that at the time Jackson supposedly made the change, in July 2011, the Respondent already had in place a policy or practice concerning the assignment of hoppers to trucks, and that Jackson changed it. Thus, the General Counsel's brief states:

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In either scenario [whether "perfectly clear" *Burns* successor or not] Respondent unilaterally changed the method used to assign hoppers to trucks without first providing the Union with notice and an opportunity to bargain regarding the change of a mandatory subject of bargaining, and therefore, violated Section 8(a)(5) of the Act.

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Thus, argument assumes that there was an existing policy or practice—an established "method used to assign hoppers to trucks"—and that Jackson changed it. Proving that there was, in fact, such a method or practice is a necessary antecedent to proving that the Respondent changed it, and the General Counsel bears the burden of proof.

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Indeed, to establish a violation, the government must prove a number of elements. It must show (1) the existence of a particular term or condition associated with the workers' current employment by the Respondent, (2) that this term or condition of employment concerns a mandatory subject of collective bargaining, (3) that the Respondent changed it, (4) that the change was material, substantial, and significant, and (5) that the Respondent made the change without affording the employees' exclusive representative notice and a meaningful opportunity

to bargain.

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The government has not carried its burden of proving that there was an extant practice or "method used to assign hoppers to trucks." The General Counsel elicited testimony from Jackson to the effect that when she worked for Berry III she chose to assign to the trucks experienced hoppers rather than inexperienced. However, because the Respondent is not a "perfectly clear" *Burns* successor and was not bound to retain the Berry III practices, Jackson's testimony about her work for Berry III is largely irrelevant.

Jackson may well have continued to prefer experienced hoppers over inexperienced, but I do not consider such a personal preference to be the same thing as an established practice. Rather, it seems likely that her opinion that experienced hoppers are safer was simply one factor she took into account in exercising her independent judgment as a supervisor.

In this regard, the complaint alleges that Jackson is a supervisor of the Respondent within the meaning of Section 2(11) of the Act. That subparagraph of the Act limits the definition of supervisor to those individuals who use independent judgment when they exercised authority on behalf of the employer. See 2 U.S.C. § 152(11). The government's allegation that Jackson meets the statutory definition of supervisor necessarily includes the allegation that Jackson must use independent judgment in performing her supervisory duties, and the Respondent has admitted it.

Jackson's supervisory duties include deciding which hoppers to assign to which trucks, decisions based not on one but a number of different factors, one of them being the relative experience or inexperience of the workers available for assignment. Jackson's testimony makes clear that when she was making such decisions as a supervisor for Berry III she took into account the relative experience of the hoppers available for assignment.

It would not be surprising if Jackson's belief that less experience hoppers are more likely to have accidents continues to influence how she exercises her independent judgment as a supervisor for the Respondent. However, even should she decide to give this factor less weight, or no weight at all, it does not change the "method used to assign hoppers to trucks." That method is to have the supervisor make the decisions, as need arises, using independent judgment.

Certainly, it is possible to imagine situations in which an employer promulgates a list of criteria to be used by the supervisor in making such choices or, going even further, assigns each criterion a specific weight. The present record does not suggest that the Respondent did so.

The government has not pointed to any document amounting to a statement of the Respondent's policy on how hoppers should be assigned to trucks. Likewise, the record does not suggest that Jackson, Richard III, or any other person speaking for the Respondent announced such a policy.

Compared to Berry III, the Respondent has demonstrated far more inclination to set policy, to memorialize such policies in employee manuals, and, more generally, to do things "by the book." Nonetheless, the General Counsel has not offered any document which reflects either the terms of a policy about assigning hoppers to trucks, or even the existence of such a policy.

Of course, a practice can come into existence and become established without any formal statement of policy. However, the present record does not persuade me that such a practice existed.

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Moreover, this unilateral change allegation rests largely on Jackson's testimony. The General Counsel has argued forcefully that Jackson is not a credible witness but rather someone willing to alter the dates on documents submitted during a government investigation. Additionally, she initially erred concerning the date on which she began work for the Respondent.

Further, considering her testimony as a whole leads me to suspect it was affected by a desire to place the Respondent, and herself, in a favorable light. Thus, it is difficult to evaluate how much of her professed concern about hopper safety reflected her actual practice as a supervisor and how much was exaggeration for the sake of appearance.

Other witnesses have corroborated some portions of Jackson's testimony, such as that pertaining to what she told the hoppers during the meeting on June 2, 2011, and, in view of that corroboration, I have credited those portions. However, Jackson's testimony about mental processes when assigning hoppers for Berry III stands by itself and I have little confidence in it.

For these reasons, I conclude that credible evidence does not establish that the Respondent had an established practice regarding how hoppers were to be assigned to trucks. Because the government has not proven the existence of such a practice, it also cannot prove there was a change in it.

In sum, with respect to the allegations raised in complaint paragraph 11(b), I find that the government has not carried its burden of proof. With respect to the other unilateral change allegations, I conclude that the Respondent, not being a "perfectly clear" Burns successor, acted lawfully in establishing the initial terms and conditions of employment unilaterally. Therefore, I recommend that the Board dismiss these allegations.

Remedy

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Beginning June 6, 2011, and continuing to the present, the Respondent's refusal to recognize and bargain with the Union has placed it in violation of Section 8(a)(5) and (1) of the Act. To remedy these violations, I recommend that the Board order the Respondent to recognize and bargain with the Union without further delay and, additionally, to post the ":Notice to Employees" attached to this decision as Appendix.

Conclusions of Law

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1. The Respondent, Creative Vision Resources, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 100, United Labor Unions is a labor organization within the meaning of Section 2(5) of the Act and the exclusive representative, within the meaning of Section 9(a) of the Act, of the following employees who constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and part-time hoppers employed by Creative Vision Resources, LLC, who work on trucks in the collection of garbage and trash in the Greater New Orleans, Louisiana area, excluding all other employees, guards and supervisors as defined in the Act.

- 3. Beginning June 6, 2011, and continuing to date, the Respondent has failed and refused to recognize Local 100, United Labor Unions, as the exclusive representative of its employees in the appropriate unit described in paragraph 2, above, and thereby has violated and is violating Section 8(a)(5) and (1) of the Act.
- 4. The Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER ORDER

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The Respondent, Creative Vision Resources, LLC, New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Failing and refusing to recognize and bargain with Local 100, United Labor Unions, as the exclusive representative of all full-time and part-time hoppers it employs in the New Orleans, Louisiana area.
- (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- 40 (a) Grant immediate and full recognition to Local 100, United Labor Unions, as the exclusive representative of its full-time and part-time hoppers and bargain with that labor organization in good faith.

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

Orleans, Louisiana, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 2011.

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(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. January 7, 2013

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Keltner W. Locke Administrative Law Judge

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If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Local 100, United Labor Unions, as the exclusive representative of our full-time and part-time hoppers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL grant immediate and full recognition to Local 100, United Labor Unions, as the exclusive representative of all hoppers we employ in the Greater New Orleans area, and will bargain in good faith with that labor organization.

CREATIVE VISION RESOURCES, LLC (Employer)

Dated:	By: _		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 South Maestri Street, Hebert Federal Building, 7th Floor, New Orleans, LA 70130-3408 (504-589-6361, House: 9:00 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389